

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Government,

HONORABLE GEORGE CARAM STEEH

v.

No. 15-20652

D-3 EUGENE FISHER,
D-4 COREY BAILEY,
D-6 ROBERT BROWN,
D-13 ARLANDIS SHY,
D-16 JAMES ROBINSON,
D-19 KEITHON PORTER,

Defendants.

STATUS CONFERENCE HEARING

Monday, May 1, 2017

- - -

APPEARANCES:

For the Government:

CHRISTOPHER GRAVELINE, ESQ.
Assistant U.S. Attorney

For the Defendants:

HENRY M. SCHARG, ESQ.
On behalf of Eugene Fisher

JOHN R. MINOCK, ESQ.
KEITH A. SPIELFOGEL, ESQ.
On behalf of Corey Bailey

JAMES FEINBERG, ESQ.
JOHN R. MARTIN, ESQ.
On behalf of Robert Brown

MARK MAGIDSON, ESQ.
JOHN THEIS, ESQ.
On behalf of Arlandis Shy

WILLIAM SWOR, ESQ.
On behalf of James Robinson

JUAN MATEO, ESQ.
On behalf of Keithon Porter

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I N D E X

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E X H B I T S

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N O N E

Detroit, Michigan

Monday, May 1, 2017

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THE CLERK: Case Number 15-20652, United States of America versus Eugene Fisher, Corey Bailey, Robert Brown, Arlandis Shy, James Robinson and Keithon Porter.

MR. GRAVELINE: Good afternoon. Chris Graveline and Raj Prasad for the United States.

THE COURT: Welcome.

MR. SCHARG: Good afternoon. Henry Scharg on behalf of Eugene Fisher.

MR. MAGIDSON: Good afternoon, your Honor. Mark Magidson on behalf of Mr. Shy.

MR. THEIS: John Theis on behalf of Mr. Shy as well.

MR. SPIELFOGEL: Good afternoon, your Honor. Keith Spielfogel on behalf of Corey Bailey.

MR. MINOCK: John Minock on behalf of Corey Bailey.

MR. MATEO: Good afternoon, your Honor. Juan Mateo appearing on behalf of Keithon Porter.

MR. SWOR: Good afternoon, your Honor. William Swor on behalf with James Robinson.

MR. FEINBERG: James L. Feinberg and John

1 Martin on behalf of Robert Brown.

2 **THE COURT:** Okay. Welcome.

3 **MR. GRAVELINE:** Good afternoon, your Honor.

4 This being a status conference, at our last status
5 conference, we talked about having all the discovery out
6 by April 15th. That is not been accomplished in this
7 case. Since the last status conference, we have produced
8 over 2,400 pages of discovery, numerous security camera
9 footage, Instagram returns, jail calls to particular
10 defendants, and other related evidence to include
11 photographs and YouTube material.

12 By our account, we still have about 500 more pages
13 of materials less the -- the agent who has been doing this
14 since our last status conference is looking at the
15 indictment, going through every overt act, collecting
16 information. So an overt act, for example, talks about
17 selling prescription pills in West Virginia. They have
18 gone to West Virginia, collected reports, collected
19 witness statements. If there is any physical evidence,
20 they've collected that. Any lab reports, and so all of
21 those things are being collected, and then being turned
22 over to the defense.

23 We believe these last 500 pages will be produced
24 by the end of this week, and then in terms of the
25 particular defendants here, I've received correspondence

1 from Mr. Feinberg and Mr. Minock asking for particular
2 pieces of discovery, as well as Mr. Mateo as well. We
3 have been working through that. Some of it -- and I will
4 be the first to say -- that I have been completely
5 responsible. For last three weeks I have been preparing
6 for another trial that was suppose start last Tuesday. I
7 owe them some responses here.

8 Most of it goes towards some of the cell phone
9 materials. Mr. Feinberg put together a letter asking for
10 I believe eight different things, and we have been talking
11 about that before trial, before this hearing as well. So
12 we are working through the discovery. We are talking to
13 each other.

14 The biggest pieces that I think we need to get out
15 still other than these 500 pages that we currently have,
16 are our expert witness notice, which would include all of
17 the lab people who tested drugs, firearms, cell phone
18 expert report. That's been a topic of conversation in
19 this group, what exactly what our cell phone expert will
20 say. They have the raw data, but they are looking for the
21 cell phone expert report.

22 Since this group is trailing the first group a
23 little bit, I think I will be producing at the same time
24 as to Group 1, the same material for Group 2. The
25 discovery that remains in terms of police reports and

1 those types of articles will be done by this Friday. I
2 will be talking with my cell phone expert, if not by the
3 end of the day today, hopefully by tomorrow to get a
4 timeline on his report, which I think will be sometime
5 during the month of May we'll have that out. I don't want
6 to give a date certain until I have spoken to him, but
7 that's what we're looking for right now.

8 For the record for this particular group, just to
9 inform this particular group where they stand in relation
10 to Group 1, Group 1 just had a trial date set for
11 October 10, 2017, motion cutoff date of July 31th for the
12 motions, and a plea cutoff date of September 18th, and the
13 Court stated that you will be gone for most of the month
14 of December in the Ninth Circuit.

15 **THE COURT:** Correct.

16 **MR. GRAVELINE:** So it is just to inform this
17 trial group where they stand in relation to that group.

18 As we laid out in the last status conference is
19 the plan in this case to see what the Capital Case Unit
20 and the Attorney General plans to do with Mr. Arnold's
21 capital case first and foremost, and with Mr. Arnold, his
22 counsel stated that they believe that they will have their
23 mitigation packet submitted to us, U.S. Attorney's Office,
24 by June 15th and hopefully before that, and we hope to
25 have a decision based on the Court scheduling this on

1 behalf of Mr. Arnold by the end of July, and so if we have
2 that decision, I think that will then help inform what
3 will happen in this particular group, and also when
4 mitigation and decisions have to be made for this
5 particular group as well, for those individuals who still
6 face death eligible charges.

7 In terms of I believe the last time we held a
8 status conference in terms of a general trial date for the
9 second group, we talked of January of 2018. Based upon
10 what we set in the first group, I think that's still
11 realistic. If we can get that first group done in October
12 and November, I think it's still realistic to try this
13 case in January. I would suggest mid-January as oppose to
14 early on, and that would give the Court 6-7 weeks between
15 trials, and it would help us sort out where we stand in
16 terms of the various pieces of evidence and whatnot.

17 **THE COURT:** Okay.

18 **MR. GRAVELINE:** That would be the
19 government's status report at this time in terms of both
20 discovery and where we stand in terms of time in this
21 case.

22 **THE COURT:** So how much will be lagging
23 behind the first group in terms of discovery for this
24 group? Is it going to be completed simultaneously with
25 the first?

1 **MR. GRAVELINE:** I would say for the most
2 part, yes. The one difference could be, for example, Mr.
3 Feinberg asked for several pieces of discovery from a 2006
4 homicide that Mr. Brown was charged with. Depending on
5 how the evidence breaks out, maybe we won't be presenting
6 as much on the 2006 homicide during that first trial since
7 Mr. Brown is not part of that first trial.

8 So that's -- I think a client specific type
9 discovery might lag behind the general discovery that
10 we're talking about, but I think we're working through
11 some of those issues, and where we agree and disagree, I
12 believe talking to defense, they might be filing some
13 motions for earlier disclosure of information, but I think
14 in terms of general discovery, I think that will be pretty
15 much on pace where Group 1 is.

16 If I could suggest to the Court that maybe the
17 motion practice for this group perhaps lag behind that
18 first group by a month so while-- or even to maybe the
19 motions would be due with this group on September 30th,
20 and even though we will be in trial, there are three of us
21 who are participating from the prosecution side. So we
22 will be able to respond to the motions from Group 2 while
23 in trial on Group 1. We can set that type of motion for
24 this group.

25 **THE COURT:** Unless you are unable to have the

1 discovery along the same pace, but it sounds like you
2 could?

3 **MR. GRAVELINE:** I think discovery will go
4 along the same pace. So for example, the cell phone
5 expert report will be given to all counsel in all three
6 groups at the same time. I'm not going to hold back just
7 because of the second group.

8 The only question are the client specific type of
9 discovery. So regardless when we do the motion deadline,
10 if we have those types of discovery disputes, perhaps it's
11 just a matter of we argue as we go along here, as oppose
12 to waiting until -- you know, in terms of discovery
13 dispute when, where and how much discovery we're obligated
14 to turn over to them.

15 **THE COURT:** My question was whether it's
16 possible to keep enough flexibility in the process so if a
17 number of individuals in Group 1 decide to take advantage
18 of a plea agreement, others could be moved up if they are
19 otherwise far enough along in discovery.

20 **MR. GRAVELINE:** Well, I think in terms of
21 this particular group, I think perhaps the only defendant
22 who might be able to take advantage of a situation like
23 that is Mr. Robinson, simply because I don't know -- and
24 I'll let defense counsel speak to this -- from a
25 mitigation point of view, they'll have their mitigation

1 packet prepared, and we'll have a decision from Washington
2 D.C. in time to move up into the October 10th trial date.
3 They are still, based on my conversations with them, they
4 are still working pretty hard. They are pretty focused on
5 that piece as oppose to moving up for trial. In this
6 particular group, I think that might only be Mr. Robinson.

7 **THE COURT:** Okay.

8 **MR. GRAVELINE:** Thank you.

9 **MR. SWOR:** Your Honor, considering the fact
10 that we've received no discovery that identifies specific
11 to Mr. Robinson, the suggestion that we could be ready for
12 a multiple defendant death penalty level trial by
13 September is absurd. The government has resisted my
14 requests to turn over specific information. I'm going to
15 be filing a motion, but it cannot be trial by ambush.

16 **MR. FEINBERG:** One of the things that -- Jim
17 Feinberg on behalf of Mr. Brown -- the Court is aware that
18 in 2006, another person in Frank Murphy Recorder's Court
19 was found guilty twice of the murder that Mr. Brown is now
20 being accused of committing in federal court. Apparently,
21 there is a complete transcript of the second trial. There
22 is no transcript of the first trial because the notes were
23 lost.

24 The government has now the entire transcript of
25 that trial. They paid \$1,800 in Frank Murphy for that

1 transcript. The government's response to my asking them
2 for a copy is, we can get it the same way they did. So I
3 don't know whether or not the Court wants to issue an
4 order allowing that transcript to be paid out of CJA
5 funds, or that the government make a copy of the
6 transcript. Apparently there's nine volumes of
7 transcripts.

8 I am fully aware that the court reporters need to
9 be paid, but I don't know whether or not the government --
10 if the Court wants CJA to buy another entire transcript
11 when, in fact, the government has it.

12 **MR. GRAVELINE:** Just to be clear on this, the
13 court reporters are independent contractors both here and
14 at Frank Murphy Hall of Justice. This is how they get
15 pay. Not in this case, but I've had multiple court
16 reporters saying, why are you handing out the transcripts
17 for free when they can order a copy, and I can be paid for
18 what I do? So that's genesis of this.

19 Now if the Court decides that no, we're not paying
20 CJA funds, that's, you know, the genesis, and you know,
21 I'm -- you know, this part of negotiation -- not
22 negotiation -- the court reporters have asked me on
23 multiple occasions to push back a little bit and say,
24 people have to order their own copy. That was my
25 suggestion. They can order their own a copy and apply for

1 CJA funds. If the Court decides, no, not paying that and
2 we're told to hand it over, we'll hand it over. That's
3 the genesis of that. I'm not trying to be some
4 obstruction here. I got it, you don't. That's the
5 genesis.

6 **THE COURT:** Is Mr. Feinberg the only one
7 affected by this?

8 **MR. GRAVELINE:** Yes, of that particular
9 transcript.

10 **THE COURT:** Was the transcript actually
11 produced for you?

12 **MR. GRAVELINE:** We asked them to prepare it.
13 It's been prepared and done as of last week, and we have
14 paid for that initial copy of the transcript.

15 **THE COURT:** So it would presumably be an
16 additional copy?

17 **MR. GRAVELINE:** I think it would be at a
18 discounted rate.

19 **THE COURT:** I'll figure it out. I'll check
20 it out.

21 **MR. FEINBERG:** If CJA funds have to be
22 used -- and I don't know how the court reporter gets paid,
23 whether I have to pay the court reporter out of my pocket,
24 and then get reimbursed --

25 **THE CLERK:** You have to file a motion.

1 **MR. FEINBERG:** But they get the order that
2 they have to submit a voucher.

3 **THE COURT:** Give me a couple of days to
4 figure it out.

5 **MR. FEINBERG:** There are additional materials
6 related to the homicide that Mr. Brown is charged with,
7 the entire Detroit homicide file at that time back in 2006
8 include all of the witness statements. The government is
9 saying they don't want to give it to us because it may be
10 Jencks. Well, if there are witness statements that say
11 someone else committed the crime, that's not Jencks.
12 That's exculpatory, and is something we need immediately.

13 Also, we made need it for mitigation purposes.

14 **THE COURT:** All right.

15 **MR. GRAVELINE:** Mr. Feinberg and I have
16 discussed this, and that might be a good substance for a
17 motion.

18 **THE COURT:** Okay. Mr. Mateo?

19 **MR. MATEO:** Your Honor, on behalf of Mr.
20 Porter, Mr. Graveline as noted previously, we've sent the
21 government written correspondence on a matter that we
22 think we should be provided discovery. I know you've been
23 busy, and I can personally attest to that. I'm going to
24 add to that list. I have another situation where I'm
25 requesting certain files from the Wayne County

1 Prosecutor's Office, and because there's one case pending,
2 they cannot release that information. I will propose to
3 the government by a stipulated order, that they order
4 Wayne County Prosecutor's Office to turn that material
5 over to us, and there may be other files that they have.
6 I have an outstanding request that I may need assistance
7 on. I may need those files for purposes of the mitigation
8 package.

9 The only other question or note that I want to
10 make in terms of discovery is they have told you that they
11 have 500 additional pages. I don't believe that would
12 cover what I believe is missing. So is there a way we can
13 have an understanding as to when we file our discovery
14 motion so we can sort this out if we have to?

15 **THE COURT:** I don't see any reason to delay
16 or file such a motion if you feel there's enough to
17 demonstrate a show cause.

18 **MR. MATEO:** We'll do.

19 **THE COURT:** You're not restricted.

20 **MR. GRAVELINE:** Just for the record, we will
21 not be agreeing to a stipulated order demanding the Wayne
22 County Prosecutor's Office to turn over the files, just
23 like we would not appreciate them stipulating to anything
24 coming out of our files. The United States government
25 will not enter into a stipulated order to that effect. So

1 Mr. Mateo can file a motion, and that will be the subject
2 of some litigation at trial.

3 **THE COURT:** So you're indicating that they
4 won't share with you either?

5 **MR. GRAVELINE:** I would imagine that, and to
6 be quite honest with you, I think I know exactly the
7 situation that Mr. Mateo is talking about here. I would
8 not -- no, I would not be seeking the contents of their
9 files for the particular person that he is talking about.

10 **THE COURT:** All right.

11 **MR. GRAVELINE:** I cannot imagine this will be
12 a situation where that I will be going to the Wayne County
13 Prosecutor's Office saying, you have to hand me over this
14 material in their investigative file, just like they would
15 not agree to that, coming to our office and saying, we
16 need your investigative files.

17 Now there are Detroit Police reports and other
18 things that Mr. Mateo wants to say, what about the Detroit
19 Police reports? That's totally different. That's an
20 investigative agency as oppose to a prosectorial agency,
21 and if there's some relevance, then we can talk about
22 that, but the investigative file from the Wayne County
23 Prosecutor's Office, no, we will not be agreeing to that.
24 That will be the subject of a motion.

25 **THE COURT:** All right. Well, I guess if

1 there are portions of that file that you feel are clearly
2 important to receive, and maybe would not constitute
3 materials withheld, and there's a request for some
4 informal action by the Court, I could certainly make a
5 call to the prosecutor's office to discuss it at least,
6 but I want you to both agree that the information --

7 **MR. MATEO:** Your Honor, I have been in
8 contact with the executive over at the Wayne County
9 Prosecutor's Office, and I believe that they would
10 probably agree to a stipulated order. So I'll do whatever
11 I can to minimize whatever issues to bring to your
12 attention.

13 **THE COURT:** All right. Okay. Any other
14 input from defense counsel?

15 **MR. MARTIN:** Your Honor, just so I can be
16 clear, if I understand what Mr. Graveline just said, which
17 I think is totally reasonable, to wait and see what the
18 department says about Mr. Arnold before any decision by
19 anybody else, and I understand that to mean that with
20 regards our submissions, we would have to wait until that.
21 There's no reason for us to file until that decision is
22 made. So I guess once a decision is made by Mr. Arnold,
23 assume if Arnold is declined, they will probably decline
24 everybody else, and then just to assume the opposite, we
25 will have some date set after that time for us to have our

1 mitigation.

2 **MR. GRAVELINE:** That's correct. That's the
3 way I would envision how that would work.

4 **MR. MARTIN:** We'll just wait to see what
5 happens with Mr. Arnold and go from there.

6 **MR. GRAVELINE:** That's correct, your Honor.

7 **THE COURT:** All right. Anybody else? All
8 right. Mr. Graveline?

9 **MR. GRAVELINE:** I'm not sure if now would be
10 a good time to set a trial date for Group 2 just so we
11 have it on the calendar, and so it's been my experience
12 that all the lawyers' calendar fill up, especially when we
13 are setting a six to eight week trial. If the Court is
14 inclined, I believe that since Group 1 is set for the day
15 after Columbus Day, I would ask for the day after Martin
16 Luther King Day in January for this, and block off six to
17 eight weeks.

18 **THE COURT:** How about we do it week after the
19 first?

20 **THE CLERK:** January 8th.

21 **MR. GRAVELINE:** That's fine with the
22 government, your Honor.

23 **THE COURT:** How does that work for defense?

24 **MR. SWOR:** Not really. So we are going to be
25 preparing during the holidays?

1 **THE COURT:** That will require some --

2 **MR. SWOR:** Besides that, we will need the
3 first trial transcripts. I mean, my client is charged in
4 a count that's charged against Mr. Arnold, and obviously
5 the evidence with regards to that, if it comes out at the
6 trial of Mr. Arnold, is going to be critical to have.

7 **MR. SCHARG:** Same thing on behalf of
8 Mr. Fisher. Mr. Arnold's trial testimony will be critical
9 in our defense, and I would ask the Court -- I concur more
10 with after Martin Luther King Day, later in the month,
11 because I don't think it is realistic to set a date so
12 early in 2018, and I would ask the Court to reconsider.

13 **MR. FEINBERG:** Judge, I would ask, looking at
14 the calendars, that we set it right after President's Day,
15 which is February 20th, so that following week. It's
16 awfully tough preparing for a trial jury during the
17 holidays.

18 **THE COURT:** That's way out.

19 **MR. FEINBERG:** It is only another month.

20 **THE COURT:** Only another month? All right.
21 Let's set it around the first of February then.

22 **THE CLERK:** February 5th, a Monday.

23 **THE COURT:** February 5th. If it turns out to
24 unrealistic --

25 **MR. SWOR:** Well, February 5th I guess is

1 fine, but just some advance notice, the weekend of
2 President's Day, Mr. Feinberg and I are already scheduled
3 to be out of town. So we may need to ask the Court for a
4 recess.

5 **THE COURT:** That will be --

6 **MR. FEINBERG:** Thursday to Monday of that
7 weekend.

8 **THE COURT:** I imagine there will be some
9 interruptions from time to time. Let's set it initially
10 for February 5th.

11 Anything else from anyone?

12 **MR. MAGIDSON:** Judge, will we receive any
13 other dates for plea cutoff or motions?

14 **THE COURT:** We need a plea cutoff date.

15 **THE CLERK:** Motion cutoff date is
16 September 30th.

17 **MR. MATEO:** December?

18 **THE CLERK:** September 30th. Do you want to
19 go to October 2nd?

20 **MR. GRAVELINE:** That's fine for the
21 government.

22 **THE CLERK:** October 2nd.

23 **THE COURT:** Plea cutoff?

24 **THE CLERK:** January 11th.

25 **THE COURT:** That's the plea cutoff.

1 Anything else?

2 **MR. GRAVELINE:** Nothing from the government.

3 **THE COURT:** Anything from defense counsel?

4 Excellent. See you then.

5 (Proceedings concluded.)

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C E R T I F I C A T I O N

9 I, Ronald A. DiBartolomeo, official court
10 reporter for the United States District Court, Eastern
11 District of Michigan, Southern Division, appointed
12 pursuant to the provisions of Title 28, United States
13 Code, Section 753, do hereby certify that the foregoing is
14 a correct transcript of the proceedings in the
15 above-entitled cause on the date hereinbefore set forth.

16 I do further certify that the foregoing
17 transcript has been prepared by me or under my direction.

18

19

20 Ronald A. DiBartolomeo, CSR
Official Court Reporter

Date

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